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IN THE

# Supreme Court of the United States

October Term, 1953

No. 417

WILLIAM BRADSHAW and UNITED STATES FIDELITY AND GUARANTY CO., a corporation,
*Petitioners,*

vs.

CARRIE ROBINSON,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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*To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioners, William Bradshaw and United States Fidelity and Guaranty Co., a corporation, two of the appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia circuit, entered in the above cause on July 30, 1953 (R. 98).

## OPINIONS BELOW

Theodore Britton, Deputy Commissioner, District of Columbia Compensation District, Bureau of Employees Compensation, rendered an opinion which is set forth on pages 6-9 of the record. The United States District Court for the District of Columbia entered a memorandum opinion, set forth on page 11 of the record. The United States Court of Appeals for the District of Columbia Circuit rendered an opinion, set forth on pages 89-97. The order of said court denying appellees' petition for a rehearing *in banc* appears at page 112.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 30, 1953 (R. 98). The jurisdiction of this Court is invoked under Title 28 paragraph 1254(1), U.S.C.A.

## QUESTIONS PRESENTED

1. Whether a workmen's compensation claimant is relieved, by virtue of Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 920(a)), of the burden of establishing a prima facie case.

2. Whether the United States Court of Appeals for the District of Columbia Circuit may disregard findings of fact of a Deputy Commissioner supported by substantial evidence of record, substituting therefor its own "findings of fact," raising of its own volition issues not presented below, on the ground that "when the evidence, with the statute, requires a different result, we must not refuse a remedy."

## STATUTES INVOLVED

The *Longshoremen's and Harbor Workers' Compensation Act* of March 4, 1927, 44 Stat. 1424; 33 U.S.C.A., 901, et seq., as made applicable to the District of Columbia by Act of May 17, 1928, 45 Stat. 600, Title 36-501, D.C. Code (1951 Ed.).

## STATEMENT OF FACTS

(References designated "R" are to the record, and those designated "A" are to the appendix to petitioners' brief.)

It was considered necessary to print portions of the transcript of testimony not printed in the joint appendix filed below for two reasons. First, the Court of Appeals in its Opinion, as will be pointed out in the body of petitioners' brief, referred to such testimony and, secondly, because an issue raised by the Court of Appeals was not considered in the lower court nor raised at any time until the Court of Appeals itself raised it and, therefore, certain testimony of witnesses having a bearing on this point was not printed in the Joint Appendix.)

There was filed on March 19, 1952, in the United States District Court for the District of Columbia, a complaint entitled Carrie Robinson vs. William Bradshaw, United States Fidelity and Guaranty Co., a corporation, and Theodore Britton, Deputy Commissioner, etc., alleging that respondent's (plaintiff's) deceased husband was an employee, at the time of his death, of William Bradshaw; that United States Fidelity and Guaranty Co. was the compensation insurance carrier for Bradshaw; and that Theodore Britton, Deputy Commissioner, acting in his official capacity, had erroneously denied plaintiff's claim

for compensation filed against Bradshaw and United States Fidelity and Guaranty Co. Respondent prayed that the said court review the entire proceedings before the Deputy Commissioner as to the conclusions of law therein contained, enter a proper decree, and enjoin the Deputy Commissioner to set aside his order and award her compensation. (R. 1-6). Defendants below filed motions to dismiss said complaint (R. 9, 10, which were granted (R. 11) and the cause dismissed (R. 11).

Respondent appealed to the United States Court of Appeals for the District of Columbia Circuit, which court, by decision dated April 16, 1953 reversed the order of the District Court and remanded for the entry of a decree requiring a compensation award to be entered (R. 89-97).

Appellees below petitioned for a rehearing *in banc*, which petition was denied July 30, 1953 (R. 112).

The compensation order complained of reads, in part, as follows:

> "That from May, 1950 to August 5, 1950, James William Robinson, hereinafter referred to as 'employee', was in the employ of the employer above named, whose address is Terra Cotta, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled 'An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes'; that the liability of the employer for compensation under the said Act was insured by the United States Fidelity and Guaranty Company; that the employment of the employee by the employer was as a driver of a tractor-trailer vehicle in connection with the operation of the employer's hauling business located at Terra Cotta, District of Columbia; that in the performance of the duties of the employment and at the employer's

directions the employee drove the employer's tractor-trailer in the District of Columbia and between points in the District of Columbia and other jurisdictions; that the employer kept the employee's employment record in the employer's office located in the District of Columbia, supervised the employee's work activities at and from the said office and paid the employee's wages at that place; that on August 1, 1950, the employer directed the employee to haul lumber to and from the establishment of a lumber dealer whose place of business was located in Wakefield, Virginia, in accordance with the instructions of the said bills of lading prepared by the said lumber dealer, and the employee began work on the said assignment in accordance with such directions; * * * that from August 1, 1950 to August 5, 1950, the employee hauled lumber between Wakefield, Virginia, and various points in North Carolina; that on August 5, 1950, at approximately 12:15 a.m., the employee drove the said tractor-trailer loaded with lumber to the lumber yard of the said lumber dealer in Wakefield, Virginia, and left it there to be unloaded; that the employee left the said lumber yard and approximately one hour later, or at about 1:00 a.m., on said August 5, 1950, he became mentally disturbed, confused, highly agitated, and obsessed with the hallucination that a mob or a group of persons were chasing him with the intent to do him bodily harm, and he began to disturb the peace of the community in his apparent efforts to escape from imaginery assailants; that later the employee was taken into custody by peace officers who lodged him in the town jail; that still later, at about 1:15 p.m., on August 5, 1950, a peace officer, accompanied by a resident of Wakefield, Virginia, went to the town jail for the purpose of removing the employee to the county jail in Sussex, Virginia; that when the said peace officer entered the town jail for that purpose the employee attacked him and his companion; that in the course of and on account of the said attack the said peace officer shot the employee in the chest with his service pistol, inflicting a wound which caused

the employee's death the same day; that on February 20, 1951, Mrs. Carrie Robinson, acting in her own behalf as the surviving wife of the employee and in behalf of James William Robinson, Jr., Maggie E. Robinson, Eulas C. Robinson, and Patsy I. Robinson, the surviving minor children of the employee, filed claim against the employer for death benefits under the District of Columbia Workmen's Compensation Act, alleging that the death of the employee arose out of and in the course of the employment; that the employee's mentally disturbed, confused and agitated condition and his hallucination, as found above, were due to illness; that the said illness caused him to attack the peace officer and his companion, as found above, and was the cause of his death; that the illness of the employee was not the result of personal injury arising out of and in the course of the employment, nor was it aggravated by or otherwise related thereto; that the death of the employee did not arise out of and in the course of the employment." (R. 6-9).

The Court of Appeals took issue with some of the above facts found by the Deputy Commissioner, and held he should have found otherwise, as particularized herein.

## SPECIFICATION OF ERRORS

1. The Court of Appeals for the District of Columbia Circuit erred in raising, considering and deciding an issue not presented, considered or decided either by the Deputy Commissioner or the District Court.

2. In holding, in effect, that in view of section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1436, 33 U.S.C.A. 920 (a)), compensation claimants are relieved of the necessity of carrying the burden of proof in establishing a *prima facie* case.

3. In failing to give weight and effect to the findings

of fact, and the conclusions and inferences drawn therefrom by the Deputy Commissioner, and in substituting in place thereof the Court's own "findings of fact", determined by the Court to be those which the Deputy Commissioner should have made.

## REASONS FOR GRANTING THE WRIT

Petitioners assert that a writ of certiorari should be granted in this cause under Rule 38 (5) of this Honorable Court for the following reasons:

The United States Court of Appeals for the District of Columbia Circuit has so far exceeded its authority and power to review a case of this nature that the supervisory power of this Honorable Court should be invoked. The Court of Appeals held, in effect, that the scope of review of a compensation case is, henceforth, to be as broad as that of a criminal proceeding, viz., that errors not assigned and issues not presented before are to be no barrier to the consideration of such on appeal; that the Court of Appeals may review the record as in a trial *de novo*, itself framing the issues, weighing the evidence and resolving conflicts therein, passing on credibility of witnesses, and ultimately directing how the facts in its opinion, should be found.

In so doing, the Court of Appeals failed completely to give effect to decisions of this Court holding that findings of fact of an administrative tribunal, where supported by substantial evidence on the record as a whole, must be approved on review (*J. J. O'Leary* vs. *Brown-Pacific Maxon, Inc.*, 340 U. S. 504, 71 Sup. Ct. 341; 95 Law Ed. 483); that issues raised for the first time upon review of a compensation order will not be considered (*Parker* vs. *Motor Boat Sales, Inc.*, 314 U.S. 244, 62 Sup. Ct. 221, 86 Law Ed. 184); that presumptions are not evidence, and their effect disappears when evidence is intro-

duced (*Del Vecchio* vs. *Bowers,* 296 U.S. 280; 56 Sup. Ct. 190, 80 Law Ed. 229); and that the burden of establishing a *prima facie* case is upon the claimant.

## ARGUMENT AND BRIEF

### I. The United States Court of Appeals for the District of Columbia Circuit Raised, Considered, and Decided an Issue Not Presented Below.

The Bureau of Employees Compensation, by means of published regulations (20 C.F.R. 41.9), has established orderly procedures for the conduct of hearings before the Deputy Commissioner, which require parties to state at the outset of a compensation hearing the particular issues upon which they wish to be heard.

The single issue presented by respondent at the commencement of the hearing (other than those pertaining to jurisdiction) was that, on August 5, 1950, the decedent was surprised and attacked by "a bunch of men" in Wakefield, Virginia; that he escaped from them and ran into the city hollering for help and assistance (A. 2); that because of the hue and cry he was taken into custody by the police, placed in the town jail, and, the following afternoon, shot and killed by the police officers without justification, cause or excuse (A. 2).

The entire hearing proceeded along this line, respondent attempting to prove facts to support the stated issue, and petitioner seeking to establish that deceased was suffering from a mental condition, wholly unrelated to his employment, which caused him to have hallucinations concerning a "mob," and further caused him violently to attack an officer of the law, who shot and killed the deceased in self-defense.

Respondent's complaint in the United States District Court for the District of Columbia alleges that deceased was "attacked by a mob," unlawfully and falsely im-

prisoned, and shot and killed by the officers while so detained (R. 3-4).

Her brief in the Court of Appeals is upon the theory that deceased was under attack by a mob, was falsely imprisoned, and was killed while exercising his Constitutional right to resist such an imprisonment with every available means, including personal force.

Nowhere in the record can there be found as an issue that of aggravation of a preexisting condition. The tenor of the transcript of testimony is that each party recognized the decision to be governed by the existence of a mob, or a mental condition, as the facts might support, the death being compensable or not, depending upon the resolution of this conflict by the trier of the facts.

Nowhere was there testimony pointing to possible aggravation of a mental condition by conditions of employment, for respondent herself contended deceased was not so afflicted.

Nevertheless, the Court of Appeals decided that the deceased was suffering from some illness, which was aggravated by certain conditions of employment, and proceeded to "award compensation" upon this theory. It accepted symptoms of a mental disease, predicated an illness upon the symptoms, and then proceeded to "find facts" as to the employment which, in the Court's opinion would aggravate the illness to the extent that the symptoms would be manifested. By this process your petitioners were denied even a modicum of opportunity to present evidence on the "aggravation" theory projected by the Court of Appeals. Had this issue been properly raised before the deputy commissioner your petitioners could have availed themselves of the right to adduce evidence on the subject. The most elemental concept of due process of law would require this opportunity.

The Court of Appeals agreed with the Deputy Commissioner that decedent was suffering from a mental condition. The issues framed before the Commission, had they been considered by the Court, would have compelled an affirmance at that point, for there can be no doubt, from a review of the record, that all parties recognized that should the deceased have had such a condition, no compensation would have been in order. But the Court, of its own volition, proceeded, thereupon, to introduce the issue of aggravation, and resolved the appeal on this point.

In so doing, petitioners submit, the Court of Appeals has exceeded its authority as an appellate court.

This Honorable Court has decided that issues not presented at the "trial level," and raised for the first time on appeal, may not be considered. *Parker* vs. *Motor Boat Sales, Inc.,* 314 US 244, 62 Sup. Ct. 221, 86 Law Ed. 184.

Petitioners submit that this is equally true whether the issue is sought to be presented by a party or by the Court itself.

The Court of Appeals quoted in its opinion a finding of the Deputy Commissioner that the illness was not "aggravated by or otherwise related" to the employment (R. 92), and then stated "* * * The question of aggravation thus comes into the case, as was recognized by the Deputy Commissioner". (R. 93).

Petitioners submit that the quoted finding of the Deputy Commissioner was superfluous as being beyond the issues presented, and that such a finding cannot change the principle that issues not raised before the Commission cannot be raised on appeal.

Moreover, the deputy commissioner's finding can most reasonably be said to relate to an aggravation of illness by personal *injury* of the kind respondent sought to

establish—namely, assault by a mob, an event which did not take place. But even if aggravation of mental illness per se had been an issue before the deputy commissioner, a finding on such an issue, on the record as a whole, could have been only one way—against causal relation. It is not supported by any fact or circumstance testified to.

Having brought "aggravation" into the picture, because of "* * * a sudden change in (decedent's) condition very soon after his return from a trip in his employment," the Court held that because of such change, during employment, petitioners had the affirmative burden of negativing the possibility that the change was related to employment.

In other words—*"Res ipsa loquitur!"*

As authority for this position, the Court of Appeals relied upon section 20(a) of the Act (44 Stat. 1436 (1927), 33 U.S.C. 920(a) (1946), providing that "* * * it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act."

**II. The United States Court of Appeals for the District of Columbia Circuit Misconstrued and Misapplied Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act.**

The Court of Appeals quoted *Del Vecchio* vs. *Bowers*, 296 U.S. 280, 56 Sup. Ct. 190, 80 Law Ed. 229, as follows:

> "The act * * * does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. * * *"

The presumption against suicide created by Section 20(d) of the Act (33 U. S. C. Sec. 920(d)) was there involved, and the unanimous opinion of this Court, delivered by Mr. Justice Roberts, continued:

> "* * * The statement in the Act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is entire lack of competent evidence. If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof, pro and con; and if it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court."

The United States Court of Appeals for the District of Columbia Circuit, in the *Del Vecchio* case held that the evidence on the issue of suicide was evenly balanced, and that the presumption, having the quality of evidence, tips the scales in favor of accident. This Court ruled the presumption to have no such quality, holding the function of the Court of Appeals to be only that of determining whether the affirmative finding of suicide was supported by evidence.

Petitioners submit that the United States Court of Appeals for the District of Columbia Circuit, in the instant case, attributed to the presumption of 20(a) the quality of evidence.

Assuming, for the purposes of this discussion, that the Court of Appeals could properly consider the issue of aggravation of an illness or disease, we search the record to determine whether evidence was introduced to support the findings of the Deputy Commissioner:

1. That deceased was mentally disturbed, confused, highly agitated, and obsessed with the hallucination that a mob or a group of persons were chasing him with the intent to do him bodily harm. (R. 7).

2. That he was disturbing the peace in his apparent efforts to escape from imaginary assailants (R. 7-8).

3. That his mentally disturbed, confused, and agitated condition, and his hallucination were due to illness. (R. 8).

4. That the illness was not the result of a personal injury arising out of and in the course of employment, nor was it aggravated by or otherwise related thereto. (R. 8)

Petitioners do not believe specific references to the transcript of testimony are necessary to show that deceased was mentally disturbed, confused, and highly agitated, for the record is replete with such descriptions of his actions as to leave no doubt that his condition was as described by such terms.

That the "mob" was an hallucination is supported by *Clarence Gardner,* on whose front porch the decedent was screaming and hollering: "A mob is after me. * * * Help!" (R. 72).

Mr. Gardner did not see any mob (R. 72), though he looked for one (A. 3).

*S. P. Lane,* Deputy Sheriff, Sussex County, could find no mob even though he drove around the town in his car looking for one (R. 26-27).

*V. L. Worrell,* a special policeman, could find no group of people, even though decedent, when he was put in the police car, said: "Don't you see all those people out there trying to hurt me? They are after me." (A. 3). And Worrell investigated, and could find no one. (A. 3).

That he was disturbing the peace is supported by the testimony of the same persons.

That his condition and the hallucinations were due to illness is supported by testimony from *Doctor Casper Kaufman,* who examined deceased the morning of his death, that his reactions were "suggestive of some one being paranoid—fearful of some impending disaster or something of that nature. • • • and I suggested that this man be committed for examination as to some involvement of the central nervous system due to lues". (R. 46).

*Doctor William P. Argy* testified in this connection that in his opinion deceased suffered from an acute hallucinosis, associated with definite paranoid symptoms, which could have been due to one of three factors—an acute paranoia (A. 4, 6) (R. 76, 77), a paranoia secondary to schizoid personality, or a paranoia due to toxicity or to infection, such as alcoholism or syphilis; that hallucinations are typical of this particular disease (A. 4); that decedent's actions were, in the Doctor's opinion, due to one of the three factors (A. 7); and that the decedent's condition, in the absence of a history of trauma, was not associated with his work (A. 6).

There was no suggestion in the testimony that deceased had sustained some physical injury that caused his condition, and, in fact, the testimony was that he had not sustained such; and Doctor Argy's further testimony that the condition was not associated with decedent's work (A. 6), and that hysteria, or mental or physical

stress, or strain, could have no connection with the decedent's psychopathic condition (A. 4-5) amply provide a substantial basis for the Deputy Commissioner's fourth finding above set forth.

With this foundation in the testimony, the finding that the illness was not aggravated by or related to the employment is a finding of fact by the Deputy Commissioner, and the Court of Appeals had no authority to invoke the presumption of Section 20(a).

The presumption could have been applied another way by the Court of Appeals, so long as it was going to apply it at all, which would have eliminated the point raised by petitioners, in I hereof. Following the Court's reasoning, could it not with equal force be maintained that the presumption, on the state of the evidence, compels a finding that deceased suffered some physical injury that brought on his condition? For the employer did not seek to negative every possibility of such injury. *"There was no evidence that such relationship did not exist."* Since the condition became manifest during employment, could it not be presumed that it was caused by some physical injury arising out of and in the course of employment, equally as well as that it was aggravated by the employment?

Petitioners submit that to pose this question is to answer it, and that the far-reaching effects of the Court of Appeals' ruling is illustrated by the analogy.

Can the Longshoremen's and Harbor Workers' Compensation Act be so construed that a compensation claimant may show the death of an employee during employment, and nothing more, and be held to have established a *prima facie* case?

If an office employee suddenly suffers a heart attack, slumps over his desk, and dies, may a *prima facie* case against his employer be established by showing merely

the fact of death during office hours? Is the employer then bound to carry the burden of establishing positively that the heart condition was not caused by, or aggravated by, the employment? Must the employer prove a succession of negatives so as to exclude all possible employment causes, with the ever present danger of not completely canvassing the entire field?

Petitioners submit that such an interpretation of Section 20(a) is preposterous, and the allowance of such an extension of the section would completely "revolutionize" well-established compensation law and procedure.

The presumption (of the New York Workmen's Compensation Act, which is identical with that of the Longshoremen's and Harbor Workers' Act) "is not intended to relieve completely an employee from the burden of showing that accidental injuries suffered by him actually were sustained in the course of his employment and arose out of the employment." *Davis* vs. *Gunderman*, 283 N.Y. 459, 28 N.E. 914. *Accord: Fidelity & Casualty Co.* vs. *Moore*, 196 So. 495, 142 Fla. 103 (where the wording of the presumption is the same as that of the Longshoremen's and Harbor Workers' Compensation Act); *Pate Stevedoring* vs. *Henderson*, 44 F. Supp. 12, reversed on other grounds, 134 Fed. 2d 440 (which construed the provision considered herein); *Hathcock* vs. *Loften*, 22 A 2d 479, 179 Md. 676 (The Maryland Statute containing a similar provision).

**III. The United States Court of Appeals for the District of Columbia Circuit Granted a "Trial de novo" in This Cause, Acting as a "Trier of the Facts," Finding Its Own Facts, and Substituting Them for Those Found by the Deputy Commissioner.**

Petitioners submit that the following principles are so well established that numerous citations are unnecessary:

The findings of fact of the Deputy Commissioner, supported by evidence on the record considered as a whole, should be regarded as final and conclusive, and not subject to judicial review. *O'Leary* vs. *Brown-Pacific Maxon, Inc., supra.*

Logical deductions and inferences which may be and are drawn from the evidence should be taken as established facts and are not judicially reviewable. *Parker* vs. *Motor Boat Sales, Inc.*, supra.

It is solely within the province of the Deputy Commissioner or Compensation Administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability. *Wilson & Co.* vs. *Locke,* 50 Fed. 2d, 81 (C.C.A. 2d Cir.).

The United States Court of Appeals for the District of Columbia Circuit, on page 6 of its opinion (R. 94), recites certain bits of evidence as being supportive of the Court's theory that the employment aggravated an illness.

"There was testimony," states the Court, "that he had been on a sixteen-hour tour of work, 'a long trip,' as Mr. Reese described it, having reported at 8: a.m. and returned after midnight."

Petitioners assert there was no such testimony, and that the Court of Appeals "pieced together" certain separate portions of the testimony; namely, that of Mr. Reese, that "the man was to live in Wakefield or close enough to Wakefield to be on my job every morning at 8:00 o'clock," (A. 2-3) and that "I sent him out with a load to a hardwood flooring factory in North Carolina, with instructions to continue around from that place, near Greensboro, on down to Council, North Carolina, and pick up a load to bring back. That was a long trip" (R. 17).

The "sixteen hour tour of work," obviously, was computed by the Court by assuming, on the basis of Reese's testimony, that Robinson had reported at 8:00 a.m., August 4th, and the uncontradicted testimony that he returned to Wakefield about 12:15 a.m., August 5th, and that he had worked this entire time.

And, of course, such a long "tour of work" constitutes the Court's basis for assuming "fatigue". (R. 94.)

The assumption that he reported at 8:00 a.m., August 4th, is unfounded because it completely overlooks and ignores the testimony that Robinson left on this "long tour" on August 3rd (A. 7). It, therefore, took two days rather than the one which the Court assumed, and no one could say what time he started work on August 4th.

The Court of Appeals recites also, on page 6 of its opinion (R. 94) "that fear coupled with fatigue could produce a hysterical or highly nervous condition".

The words of this "testimony" are those of claimant's counsel, and the question was objected to by petitioners (A. 8). The objection to the question was on the grounds that there was no evidence of "fatigue" or "fear" to supply a foundation for the question (A. 7). The answer was permitted subject to being "connected up" by later testimony (A. 8). Doctor Adams' answer was simply "It could" (A. 8; R. 88).

The Court also states that there is evidence "that he was probably suffering a hysterical reaction from fear or possibly from some bodily injury" (R. 94). This is taken again from a question asked by respondent's counsel (A. 8), and to which the same objection above noted was made and the answer permitted on the same basis. The "connecting" testimony was not supplied in either instance.

The Court of Appeals in its opinion cited these statements as evidence, and in effect held that the Deputy

Commissioner should have found them to be the facts. In so doing, it apparently did not consider the basis upon which the questions and answers were allowed.

The Court of Appeals, furthermore, in reciting such statements as evidence, concludes in effect, that Robinson was suffering from some hysterical reaction. This is at complete variance with other testimony in the record from Doctor Argy that Robinson was not suffering from hysteria but rather that it was a psychopathic condition (A. 4); that the psychopathic condition could not be brought about by some form of hysteria (A. 4); hysteria and psychosis being two different entities, hysteria being psychoneurosis and not a psychosis, and hallucinations and delusions being associated with a psychosis but not with a psychoneurosis (A. 5).

So the Court of Appeals had before it on the one hand testimony (which petitioners assert could legally not have been considered) that Robinson was suffering from hysteria and on the other hand that he was suffering not from hysteria but from a psychosis. The Court goes quite beyond its powers to accept the former and ignore the latter.

The Court also referred in a foot-note on page 5 of its opinion (R. 93) to the testimony of Doctor Argy, appearing on pages 285 and 286 of the transcript of hearing (A. 6-7), but not appearing in the joint appendix, to the effect that it was the Doctor's opinion that deceased was suffering from paranoia. It discounted this testimony by stating that since the Doctor could not testify which of three types of paranoia it was, then the testimony was not acceptable as evidence and would not support a finding that the illness was due to a paranoia; and after disposing so easily of Doctor Argy's testimony, because he could only "guess" as to which of the three factors could have caused the deceased's condition, the Court

recites as evidence that "fear" * * * *could* produce * * *; *perhaps* fear * * * was * * *"; "he was *probably* suffering * * * from fear or *possibly* from some bodily injury" (R. 94).

Petitioners respectfully submit that the Court of Appeals exceeded by far its authority to review a case of this type by disregarding the facts as found by the Deputy Commissioner, which are amply supported in the record, by disregarding the logical deductions and inferences which the Deputy Commissioner properly drew from the evidence, by its finding of facts as evidence and by invading the province of the Deputy Commissioner to determine the credibility of witnesses, and holding that the Deputy Commissioner should have accepted the testimony of one witness over another. The standard for judicial review set forth in the *Camera* case, infra, was not only not followed, but a course of review was followed which is at complete cross purposes to that standard.

Even though the testimony from Doctors Argy and Adams might be considered to be "fairly conflicting views" (which petitioners submit they are not, from the nature of the testimony itself), the Court of Appeals could not displace the findings of the Deputy Commissioner, even though it might have found otherwise had the matter been before it *de novo*. *Universal Camera Corp.* vs. *N.L.R.B.*, 340 U.S. 474; 71 Sup. Ct. 456; 95 Law Ed. 456.

**IV. The Longshoremen's and Harbor Workers' Compensation Act is National in Scope, and a Decision With Respect to Its Enforcement Constitutes a Precedent of General Application, and Should be Reviewed and Settled by This Honorable Court.**

Mr. Justice Roberts, in *Del Vecchio* vs. *Bowers*, supra, speaking for this Honorable Court, held that:

> "We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the Common Law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of paragraph 20(d)."

The decision of the United States Court of Appeals for the District of Columbia Circuit in this cause, applying section 20(a) of the Act, falls into the same category as did the *Del Vecchio* case. The Court of Appeals has adopted an entirely new concept of the scope of review afforded by the Act and permissible under established doctrines.

Because the Court of Appeals was convinced that when the "evidence, with the statute, requires a different result, we must not refuse a remedy," it extended the jurisdiction of reviewing courts further than any court has ever done in the past, and further than this Honorable Court has stated was allowable. Not only did it act as a trier of the facts, and raise an issue for the first time, but it also applied a new interpretation to section 20(a) of the Act, the effect of which is to remove completely from a claimant in a compensation hearing the burden of proving his case, and shifting to the respondent in such a case the impossible burden of negativing all possible, even though improbable, relations between an injury or death and employment.

This is an entirely new theory of compensation law, and is of such importance that this Honorable Court should, in the exercise of its responsibility for the proper construction and application of Federal Statutes, and in

exercise of its supervisory powers over lower courts, issue a writ of certiorari under the Seal of this Honorable Court in this cause, directed to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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# Supreme Court of the United States

No. .....

WILLIAM BRADSHAW and UNITED STATES FIDELITY AND GUARANTY CO., INC., *Petitioners*

vs.

CARRIE ROBINSON, *Respondent*

## APPENDIX TO PETITIONERS' BRIEF

Will you state the claim, Mr. Jackson?
Mr. Jackson: * * *

* * * *

* * * He went to the lumber yard of Mr. Thomas Reese and a watchman was there on duty. He requested or asked of this watchman certain comforts which were necessary because he had been driving the greater portion of the evening and the day, and that while he was at the lumber yard washing up, getting water, and what not, he was surprised by a bunch of men, the names of none of them we know; and that they attempted to attack him and did attack him; that he got away from them and ran into the city, on the porch of one of the residents of Wakefield; and there, hollering, "Help, they are after me, assistance."

In fact, a hue and cry was made that shortly thereafter two sheriffs or two officers of the law arrived and they took him into their custody and he was much relieved when he found that he was in the hands of officers of the law, realizing that he had some protection from them. That he was lodged in a temporary confinement on the morning of August 5 about 1 a.m., and there he remained in this temporary confinement until about one o'clock p.m. on the date of August 5. That on that day, about the time stated, officers of the law entered this place of confinement where he was and shot and killed the employee without justification, cause, or excuse. That he remained after a doctor came, or a coroner, whichever it may be, and pronounced him dead between the hours of 1 p.m. and 2 p.m. on that date.

* * * *

*Thomas Emmett Reese*

* * * *

By Mr. Jackson:

* * * *

Q What was that agreement? A That agreement was that he was to put a new truck down

there with a driver, subject to my supervision, my instructions, to go where I wanted him to go, whether in the state or out of the state, and his driver was to make his residence there. In other words, our agreement was that that man was to live in Wakefield or close enough to Wakefield to be on my job every morning at 8:00 o'clock.

• • • •

196 *V. L. Worrell*

• • • •

198 By Mr. DeShazo:

Q You say you put him in the jail? A Yes, sir.

Q You said he said someone was after him? A Yes, sir. When we put him in the car he said: "Don't you see all those people out there trying to hurt me? They are after me."

Q When you looked out, did you see any people? A No, sir.

Q Did you later investigate to see if there were any groups of people around? A Yes, sir.

Q Did you find anybody? A No, sir.

199 Q Was Robinson injured in any way when you took him into custody? A Not that I saw.

Q He did not complain of being hurt in any way? A No, sir.

• • • •

259 *Clarence Randolph Gardner*

• • • •

261 By Mr. DeShazo:

Q When you came out of your house and when you looked out the door and on your way to the jail did you try to see if there was any mob around or anybody around? A I did.

262 Q Did you see anybody? A No.

• • • •

277 *William P. Argy*

• • • •

278 By Mr. De Shazo:

• • • •

279 A I believe that the man suffered from an acute hallucinosis, associated with definite paranoid symptoms which could have been due to one of three factors. It could have been due either to an acute paranoia, a paranoia secondary to schizoid personality, or a paranoia due to toxicity or to infection, such as alcoholism or syphillis.

Q Now, do these patients suffer from hallucinations, Doctor? A Yes, sir.

Q And as shown by the record, the hallucinations that he seemed to be suffering from, are they typical of this particular disease? A Yes, sir.

• • • •

By Mr. Jackson:

• • • •

280 Q Now, doctor, you stated that this man was suffering from hallucinations, an acute paranoia; that is, in the language of the layman, that he was deranged, is that right? A I don't know. I don't know how a layman would interpret that term "deranged".

Q Would you say he was suffering from hysteria? A I would say that it was a psychopathic condition.

Q Could that be brought about by some form
281 of hysteria? A Not as I interpret hysteria.

The Deputy Commissioner: What do you mean by hysteria, Mr. Jackson?

Mr. Jackson: That is a condition produced by stress and strain.

The Deputy Commissioner: Of what kind; mental or physical?

Mr. De Shazo: I object.

Mr. Jackson: Just a minute, Mr. De Shazo.

Mental or physical.

By Mr. Jackson:

Q That is, following an accident, or an attack, under such circumstances an injured person would be at variance from his normal condition, if that be so, would he not, doctor?

The Deputy Commissioner: Do you understand the question?

Mr. De Shazo: Mr. Britton, I object to that question. There is no evidence of these facts that he is projecting this question on in the record.

The Deputy Commissioner: All the evidence is not in, according to my understanding, Mr. De Shazo; and any question that is propounded I assume counsel means to lay a foundation for in the evidence.

282 Mr. De Shazo: Well, of course if he does lay a foundation—

The Deputy Commissioner: But I am not sure that I understand the question. I am wondering if the doctor does.

The Witness: I might clarify it by saying this: that is, that hysteria and phychoses are two different entities. Hysteria is purely psychoneurosis. It is not a psychosis. And hallucinations and delusions are not associated with a psychoneurosis. A psychosis does have hallucinations and delusions associated with it.

So that, basing my conclusions on those two facts, I would say that hysteria would have no relation to the condition in this man, because my impression was that it was a definite psychosis.

• • • •

284 By the Deputy Commissioner:

• • • •

285 A I would say he was suffering from an acute paranoia.

Q The cause of which you are not certain? A Not certain, but in the absence of a history of trauma I would say it was not associated with his work.

Q Could trauma precipitate such a condition in a person who has a tendency to psychosis? A It would precipitate a syphillitic type.

Q If the patient was suffering from the effects of syphillis upon the central nervous system, trauma might precipitate an episode of hysterical actions and reactions; is that right? A You are using the word hysterical, too.

Q Well, psychotic episode? A A psychotic episode, yes; that is very characteristic of paresis, which is the name which we give to the syphilitic form. The patient will go along for a longer time; he may go along for a long time and he may show no symptoms whatsoever, excepting that he might be a little lax in his morals, he may be a little lax in his ability to take care of his financial affairs and so forth, squander money and such things as that.

Then he has what we call a seizure, a sudden precipitation of all of his symptoms, which is manifested
286 by the acute psychotic symptoms, and that is commonly brought on by trauma.

Q But you mentioned, I think, three probable or possible causes of this man's actions. Which of the possible causes mentioned by you do you consider the most likely? A The answer to that would be purely a guess, because there is no definite history. You would have to have a longitudinal story.

Q By that you mean? A You would have to know what went on before.

Q Yes. I see. A And there is nothing which would enable you to conclude that it was due to any one of the three factors.

Q The best you can do is to say that it was probably the result of one of the three factors you have mentioned? A Yes, sir.

• • • •

288 *David Edwards*

• • • •

290 By Mr. Jackson:

• • • •

291 Q Did you on Thursday, August third, load a tractor trailer, which tractor trailer was driven by James W. Robinson, on the third day of August, did you assist in loading that tractor trailer? A Yes, sir.

• • • •

308 *Dr. Charles F. Adams*

• • • •

311 By Mr. Jackson:

Q Now, doctor, from your experience, a person disoriented as Dr. Kaufman says, could that result from fear or an attack or an accident?

Mr. De Shazo: I object to that question. There is no evidence of an attack; there is no evidence of fear.

Mr. Jackson: Mr. Commissioner, the records is full of fear, and attack. The officers testified they tried to find the persons.

The Deputy Commissioner: Our record isn't complete, Mr. De Shazo.

Mr. De Shazo: All right.

The Deputy Commissioner: And we customarily call doctors out of order to accommodate them.

Mr. DeShazo: Okay.

Mr. Jackson: Yes.

The Deputy Commissioner: I will note your objection.

• • • •

316 Q I take it, then, doctor, that you are inclined to believe that the man was probably suffering a hysterical reaction from fear, or possibly from some bodily injury; is that right? A I feel that way about it; and, incidentally, the fact that he was disoriented in a jail, thought he was in Alexandria, unless he was familiar with the inside of the jail there is no way of knowing where he would be.

* * * *

317 By Mr. Jackson:

Q Would fatigue, coupled with fear, produce a hysterical or a highly nervous condition, doctor?

Mr. De Shazo: Mr. Commissioner, I understand that all of this testimony is going in subject to being connected up, subject to my objection.

The Deputy Commissioner: Yes.

Mr. De Shazo: All right. I don't want to keep interrupting.

The Deputy Commissioner: I note your objection. This doctor is appearing as an expert.

Mr. De Shazo: Yes. All right.

318 The Deputy Commissioner: Go ahead, doctor. Read the question.

The Reporter (reading): "Would fatigue, coupled with fear, produce a hysterical or a highly nervous condition, doctor?"

The Witness: Once again I must answer, it could.

23

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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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# No. 417

---

WILLIAM BRADSHAW AND UNITED STATES FIDELITY AND GUARANTY CO., A CORPORATION,
*Petitioners,*

*vs.*

CARRIE ROBINSON,
*Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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# No. 417

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WILLIAM BRADSHAW AND UNITED STATES FIDELITY AND GUARANTY CO., A CORPORATION,
*Petitioners,*

*vs.*

CARRIE ROBINSON,
*Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### Opinions Below

The United States District Court did not write an opinion but in lieu thereof filed a short memorandum and entered an Order dated June 17, 1952, dismissing the Complaint of the respondent (R. 11).

The opinion of the United States Court of Appeals for the District of Columbia Circuit is dated April 16, 1953 (R. 89-97). The petitioners' petition for a rehearing in banc was denied by a 7 to 2 decision of the said Court of Appeals,

and its Order to that effect was issued July 30, 1953. (R. 112).

## Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on the 16th day of April, 1953 (R. 98). The Order denying the petition for rehearing in banc was entered July 30, 1953 (R. 112).

## Questions Presented

1. Was the decision of the United States Court of Appeals in conformity with the Administrative Procedure Act of 1946, Ch. 324, (60 Stat. 237, 243). Public Law 404, Sec. 10(E) and subsequent decisions of the Supreme Court relating thereto.

2. Will the Supreme Court review a decision of the United States Court of Appeals, where that Court has made a fair assessment of the record, on the issue of substantiality of a Workmen's Compensation Order.

## Statutes Involved

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424; 33 U.S.C.A., 901, et seq., as made applicable to the District of Columbia by Act of May 17, 1928, 45 Stat. 600, Title 36-501, D. C. Code (1951 Ed.) and the administrative Procedure Act of 1946, Section 10(E), 60 Stat. 237, 243.

## Counter Statement of Facts

References designated "R" are to the record and those designated "A" are to the appendix to petitioners' brief, and those designated "Brief" are to the brief of petitioners.

The petitioners' statement of facts (Brief 3-6) fairly reflects an accurate account of the proceedings below. It is deemed essential to add only these additional facts:

1. The issue of aggravation is implicit in the issue of "death arising out of and in the course of employment," which was filed with the claim of respondent with the Deputy Compensation Commissioner, (R. 8).

2. That portion of the petitioners' statement of facts, (Brief 3) which refers to the following language of the opinion, "because an issue raised by the Court of Appeals was not considered in the lower court nor raised at any time until the Court of Appeals itself raised it," is an exparte expression of the petitioners themselves.

3. The petitioners' petition for a rehearing by the Court in banc was considered by the nine Judges of the Court of Appeals in chambers and by them denied by a vote of 7 to 2.

4. Rule 17(I) of the United States Court of Appeals for the District of Columbia Circuit, being similar to Rule 27(6) of the Supreme Court, empowers the said Court of Appeals to notice and consider unassigned errors appearing in the record.

## ARGUMENT AND BRIEF

**I. The decision of the United States Court of Appeals for the District of Columbia Circuit is based upon the record considered as a whole.**

The claim of the respondent filed in the office of the Deputy Compensation Commissioner for the District of Columbia presented the issue, "that the death of the deceased employee arose out of and in the course of his employment, (R. 8). The Complaint of respondent filed in the United States District Court, for the District of Columbia, in paragraph nine (9) thereof, raised the issue of the death of the deceased employee arising out of and in the course of his employment, (R. 5). Respondent takes the position that the issue thus raised was inclusive of the issue of aggravation. The petitioners cannot now complain

that they were deprived of the opportunity of presenting evidence in opposition to the said issue of aggravation, at the hearing before the Deputy Commission, since this issue is implicit in the issue of death arising out of and in the course of employment. That this is true, is recognized by the Deputy Commissioner in his findings of fact, (R. 8). The Deputy Commissioner's conclusion of law to the effect, *"that the death of the employee did not arise out of and in the course of the employment"*, was in part predicated upon his factual findings, viz. *"nor was it aggravated by or otherwise related thereto."* The petitioners have not questioned the correctness of the Order of the Deputy Commissioner, heretofore and now are "Estopped" relative to the issue of aggravation. It must be conceded, that aside from the foregoing argument of the respondent, Rule 17(I) of the United States Court of Appeals for the District of Columbia Circuit empowers that court, at its *option,* to *notice* and *consider errors* appearing in the record, though not *assigned,* accord: *Shelman* v. *Shelman,* 68 App. D. C. 179. Likewise, Rule 27(6) of this Court reserves to the Court the right, at its option, *to notice a plain error not assigned or specified,* accord: *Sibback* v. *Wilson and Co.,* 312 U. S. 1, 16, 61 S. ct. 422, and *Columbia Height Realty Co.,* v. *Rudolph et al.,* 217 U. S. 547, and *Wheeler* v. *Eby,* 264 U. S. 32.

It is noted on page 10 of the petitioners' brief that they attempt to make superfluous, the Commissioner's findings with respect to the issue of *"aggravation."* It may be said in taking such a position, the petitioners beg the question. If they felt that this part of the Commissioner's findings was erroneous they could have prosecuted a cross appeal therefrom. They did not think it wisdom to even suggest such a course until they were met with an adverse decision at the hand of the Court of Appeals.

The instant opinion of the Court of Appeals speaks for itself and needs no support from counsel. The respondent therefore directs her efforts to the task of preventing a distortion of that opinion by the petitioners. The petitioners further attack the opinion of the Court of Appeals, on the ground that the opinion imposed the affirmative burden upon them, of negativing the possibility that the change (in the conduct of deceased) was related to employment, (Brief 11). This attack, by the petitioners, is unwarranted under law, especially, since in the case of *Del. Vecchio* v. *Bowers,* 296 U. S. 280, 56 S. Ct. 190, 80 Law Ed. 229. It was held, that the employer must rebut the *prima facie* case made, by the statutory presumption, by substantial evidence, so then the burden was not imposed on the petitioners by the instant opinion of the Court of Appeals but instead thereof it was imposed by Section 20(a) of the statute and sustained by the Supreme Court in the *Del Vecchio* case, *Supra.* The contention therefore that, "The United States Court of Appeals for the District of Columbia Circuit, *raised, considered* and *decided* an *issue not decided below*" is without merit and foundation in law.

**II. The United States Court of Appeals for the District of Columbia Circuit Properly Construed and Applied Section 20(a) of the Longshoreman's and Harbor Workers' Compensation Act.**

The opinion of the United States Court of Appeals is next challenged, by petitioners, on the ground that it misconstrued and misapplied Section 20(a) of the act. This section provides as follows: 20(a), that, in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary, (a) That the claim comes within the provision of this chapter." What then was the

evidence before the Deputy Commissioner? What evidence was there of a substantial character negativing the issue of aggravation? Let us examine the record for this purpose. There is nothing in the testimony of Dr. William P. Argy (A 4-6) (R. 76-77) that disclosed the absence of aggravation.

He stated that in the absence of a history of trauma the decedent's condition was not associated with his work. The doctor concluded, however, when asked which of the three (3) causes of the decedent's condition was the most likely, he replied, (A-6) *"the answer to that would be purely a guess, because there is no definite history, you have to have a longitudinal story."* The testimony of Dr. Argy is incompetent to support a finding that the illness of the deceased was due to acute paranoia not associated with his work, much less that it was not aggravated or agitated by his work. There is no other evidence in the record independent of the *"guess evidence* of Dr. Argy relative to the illness of the deceased not being associated with his employment. The whole record is devoid of any evidence tending to show the lack of aggravation. The learned Judge writing the opinion in the instant case for the said Court of Appeals stated (R. 93), that: *"Robinson's conduct demonstrates a sudden change in his condition very soon after his return from a trip in his employment. The question of aggravation thus comes into the case, as was recognized by the Deputy Commissioner." "Since the death cannot be said to have resulted from the natural course of an illness the relation of the employment to aggravation of the illness and, consequent must be considered. There was no evidence that such relationship did not exist."*

The opinion (R. 94) proceeded to enumerate the testimony in support of aggravation, reference is then made

to the testimony of Dr. Kaufman, in which the doctor said, "*the deceased should have been institutionalized for examination involving the central nervous system due to lues; that on the day of his death he was agitated, fearful and confused,* pages 45-46 of the record also sustain the Court in its recital of the testimony aggravating the deceased's illness."

The Court further observed that the deceased had been on a sixteen (16) hour tour of work, a long trip leaving Wakefield at 8 A. M., returning after midnight. The record, pages 15 to 18 sustains the factual recital of the Court's opinion, aforesaid. The opinion further states, that on the previous day the deceased had told another of threats against him, that he had been told to take his truck back to Washington or it would be too bad for him. The Court is fully supported by the record in this respect (R. 78, 79, 80), concluding its recital of aggravating testimony, the opinion disclosed, that he was *disoriented;* that fear coupled with fatigue could produce a hysterical or highly nervous condition, that perhaps fear or attack was the precipitating cause; that he was probably suffering a hysterical reaction from fear or possibly from some bodily injury."

Again the record sustains the recital in the instant opinion. (R. 86, 87, 88).

It is at this point that the instant opinion draws the conclusion, that even if the above evidence standing alone did not necessitate a finding of aggravation of the underlying illness, attributable to employment. Section 20(a) of the statute itself, in this state of the evidence, required a conclusion to that effect.

That the evidence above was sufficient to invoke the operation of the presumption provided in Section 20(a) under the statute is beyond question. In the *Lapinsky's* case, 325 Mass. 13, 88 N.E. 2d. 642 (1949), the Supreme

Judicial Court of Massachusetts construing, G.L. (Ter. Ed.) c. 152, par. 7A, as added by St. 1947, c. 380, and which statute is analogous to section 20(a) of the Longshoremen's Act, said, "that where the deceased was sent up by his foreman to turn on a silo at 2:45 P. M., and was found dead from asphyxiation, immersed in sand forty (40) feet from the silo, at 8:30 A. M., the next morning, that sufficient foundation was laid to put in operation the *presumption* under the statute." That contrary to what the reviewing board seems to have held, it was not necessary that the claimant establish that the employee's injury arose out of or in the course of his employment in order to obtain the benefit of the presumption. To hold otherwise would be to read something into the statute that is not there either expressly or by implication, accord: *Marra Bros.* v. *Cordillo,* 3 cir., 154 F. 2d 357.

The petitioners strenuously urge, the case of *Del Vecchio* v. *Bowers,* 296 U.S. 280, as decisive of the point here, but, that case differs factually from the instant case; there, substantial evidence of suicide was before the Deputy Commissioner, while in the instant case the record is completely void of any evidence tending to show that the decedent's illness was not aggravated by his employment. Moreover, the *Del Vecchio* case *supra,* was decided November 13, 1935, and must yield to the provisions of the Administrative Act of 1946, 60 Stat. 237. Section 10(E) of which provides in part as follows:

Said act empowers the reviewing court to decide all relevant questions of law, to interpret constitutional and statutory provisions and to determine the meaning or applicability of terms of any agency action. The reviewing court is further empowered under said act:

> "(a) to compel agency action unlawfully withheld or unreasonably delayed, and (b) to hold unlawful

and set aside agency action, findings and conclusion found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitation or short of statutory right, (4) without observance of procedure required by law; (5) unsupported by substantial evidence, etc.; (6) *unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.* That in making the foregoing determination the reviewing court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error."

Even in the *Del Vecchio* case, *supra,* it recognizes the statutory presumption as beneficial to claimant and that the employer must rebut the *prima facie* case by substantial evidence. In the *Marra Bros.* case, *supra,* it was held:

"We are of the opinion that under the circumstances of the case at bar the provisions of Section 20(a) of the act are of such impact as to require the affirmance of the judgment of the court below. The language of the section was designed to meet just such fact situations as the one presently before us. We concluded that if it were proved as here, that the decedent was employed as a longshoreman and that he met his death in or about a vessel on the navigable waters of the United States and that nothing more is shown, the Deputy Commissioner must hold that his widow's claim is within the purview of the statute," accord: *Smoot S&G Corp.* v. *Deputy Commissioner,* 80 U.S. App. D.C. 260, 152 F., 2d 17.

The contention of petitioners that the Court of Appeals misconstrued and misapplied Section 20(a) of the act is without basis and contrary to the decisions of the Supreme Court.

**III. Section 10(E), (b), (6) of the Administrative Act of 1946 Empowers the United States Court of Appeals to Try Compensation Cases De Novo, but Such Powers Were Not Exercised in the Instant Opinion.**

Petitioners further attack the opinion of the said United States Court of Appeals, as having engaged in a trial de novo of the facts. This accusation is unwarranted from the context of the opinion itself. The opinion concedes to be law, that, "The Deputy Commissioner's findings of fact are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." (R. 90). It is in this light, that the findings of the Deputy Commissioner, were not supported by substantial evidence with reference to the illness of the deceased not having been aggravated by or otherwise related to the employment.

All of the evidence recited by petitioners on pages 17, 18, and 19, of their brief refer to aggravation; except the testimony of Dr. Argy, who admitted that he was guessing, in the absence of a definite history.

The petition for a writ of certiorari does not present a case such as was before this Court in *Universal Camera Corp.*, v. *N.L.R.B.*, 340 U.S. 474. The question is not whether the Court of Appeals could displace the Deputy Commissioner's findings of fact, even though it might have found otherwise had the matter been before it de novo. The question is simply as stated by the Court of Appeals on page 2 of its opinion (R. 90), that: "In one critical respect we think they lack such support and this, together with the statutory presumption that the claim comes within the provision of the act, requires reversal."

In the *Universal Camera* case, *supra,* also cited by petitioners on page 20 of their brief, the Court of Appeals for the Second Circuit felt itself powerless to disturb the find-

ings of the N.L.R. reviewing board, since the findings of that board was supported by substantial evidence. The said reviewing board had over-ruled the examiner's findings of fact and his recommendation, that the instituted proceeding be dismissed. The opinion of the Second Circuit Court of Appeals asserted in part as follows: "That although the Board would be wrong in totally disregarding his findings, it is practically impossible for a Court, upon review of those findings which the board itself substitutes, to consider the Board's reversal as a factor in the courts own decision."

The position thus taken by the Second Circuit Court of Appeals was the basis for the corrective opinion of the Supreme Court. Speaking, through Mr. Justice Frankfurter, his learned and reassuring opinion observed; that: "The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion, however, halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything logically probative of some matter requiring to be proved."

This opinion further alerted the Court of Appeals to an awakening of their reviewing powers under the administrative act of 1946, *supra,* as follows: "Our power to review the correctness of application of the present standard ought seldom be called into action, whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." The *Camera* case, *supra,* was remanded to the Court of Appeals for the Second Circuit with instructions to reconsider the whole record including the record upon which the examiner's findings of fact rested. The opinion

therefore of the United States Court of Appeals for the District of Columbia is in accord and harmony with the mandate implicit in the *Camera* case, *supra.*"

Moreover the cases cited by petitioners on page 17 of their brief do not conflict with the instant opinion of the Court of Appeals. For example, the case of *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 71 Sup. Ct. 341, compensation was awarded a dependent mother for the death of her son arising out of and in the course of employment. In that case the Supreme Court held: That under the administrative Act of 1946, *supra,* the findings of the Deputy Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. This Court then concluded that the record was slim and the relevant standard was not difficult to apply, upon an application of the standard, this Court found that the findings of the Deputy Commissioner were amply supported by substantial evidence. In *Wilson & Co.* v. *Locke,* 50 F. 2d 81, the decision was rendered on May 18, 1931, thus antedating the administrative act of 1946, *supra,* and for that reason cannot be considered as competent authority.

In *Jacobson* v. *Department of Labor,* 37 Wash. 2d 444, 224 P. 2d 338 (1950), the pre-existing schizophrenia was unrelated to the employment, but was aggravated by "Heat stroke". On page 341 of the opinion, the Court quotes from medical authorities disclosing how a schizophrenia can become aggravated, "Mental shock seems to be important. Physical shock is not an exciting cause. After injury, the intellect is more likely to be sharpened. The introvert is forced out of himself by the accident, becomes rudely awakened to life about him, and for a time at least his tendency to withdraw from society is more likely to be lessened. Shock as an exciting cause must be prolonged in character, gradually breaking down the deceased brain, physical shock is of short duration, unable to so do,

while mental shock continues through the patient review of his troubles, hour after hour, etc." (1 Gray, attorneys' text book of medicine, 3rd Ed., Pp. 1012-1013). From the foregoing there is medico-legal basis for the sudden change in the conduct of the respondent's intestate. His mind was clouded with the recurring thought of the statement made to him before his departure on his 500 mile tour of work. His sudden change (R. 68) upon his return from the 500 mile trip is unchallenged. His eyes were glazed and looked like they would pop out of his head, (R. 69) a few moments later deceased was in a very excited condition and very nervous (R. 26). These were some of the conditions of the deceased manifested upon his return and shortly thereafter, that gave rise to aggravation, thus placing the presumption under the statute in operation.

"Take that truck back to Washington where he came from or that it would be too bad for him." (R. 80). His mind was further befuddled and clouded when he was told to wait in Wakefield until his boss arrived, in deference to his desire to return to Washington. The deceased was in the course of his employment at the time of his sudden change.

**IV What Constitutes the Existence or Absence of Substantial Evidence on the Record as a Whole.**

In two of the recently decided cases of the Supreme Court (*Universal Camera Corp.* v. *N.L.R.B., supra,* and *N.L.R.B.* v. *Pittsburgh S.S. Co.,* 340 U.S. 498), involving judicial review of National Labor Relation Board Orders, the Court speaking through Mr. Justice Frankfurter, has opened a new chapter in the long controversy concerning judicial control over administrative determinations. The Administrative Procedure Act, *supra,* provides for the reviewing court to set aside agency actions unsupported by

substantial evidence, and in making the foregoing determination the court shall review the whole record or such portions thereof as may be cited by any party. Section 921 (B) of the Longshoremen's Acts, 33 U.S.C.A. 901 et seq., provides for judicial review, and if the order of the Deputy Commissioner is not in accordance with the law the reviewing court may suspend or set it aside in part or in whole. In the *Camera* case, *supra,* the Supreme Court held, that the judicial review provisions of the Administrative Procedure and Taft-Hartley Acts, were identical in meaning; that the legislative history of both acts indicated the same purpose behind these provisions, and that these statutes had broadened the scope of judicial review. One of the most remarkable features of the decisions is precisely this forthright and categorical assertion, by the Court; "that the law has been changed." If attention is focused on what is said in the *Camera* case, *supra,* this conclusion is reinforced beyond question, as to whether the case establishes a significant doctrinal innovation, by what the Supreme Court said in the *N.L.R.B.* v. *Pittsburgh S.S. Co., supra.* In the latter case decided on the same day, there appeared to be the first step in an important alteration of the relation between the Supreme Court and the Court of Appeals in the area of judicial review. For many years prior to the said two opinions of the Supreme Court, above, appellate courts were not in accord on what the Supreme Court meant by the "substantial evidence test," which had evolved under the Wagner Act. The tendencies of those courts were to sustain the evidence of the agencies, and in so doing, considered merely the evidence favorable to such agencies and thereon determining whether that would give substantial logical support to the findings. All evidence to the contrary was apparently disregarded, however, much of it might have dwarfed the supporting evidence.

That as a result of the foregoing, some of the able legal commentators pointed out that even in the accused cases, the opinions had rehearsed a large mass of evidence, much of which emanated from the mouths of the employer's witnesses, which seemed clearly to raise issues capable of being rationally decided either way.

Chief Justice Hughes said in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197 that "substantial evidence meant such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, which implied a review of the whole record." Mr. Justice Frankfurter tells us in the Camera case, supra, that it must be remembered that precise definition is impossible, since the precise way in which courts interfere with agency findings cannot be imprisoned with any form of words, as stated by the Court, "there are no talismanic words, that can avoid the process of judgment" and the Justice, with a frank avowal of the intangible character of the decision which the Court was called upon to make, states; "It is fair to say that in all this Congress expressed a mood and it expressed its mood not merely by oratory, but by legislation, as legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application." The learned Justice then proceeds to make the following points: (1) The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. (2) The rule was not intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect, and (3) Nor does it mean that even as to matters not requiring expertise, a court may displace the Board's choice between two fairly conflicting views, even though the

court would justifiably have made a different choice had the matter been before it de novo. The above language indicates that reviewing courts may give consideration and weight to the record as a whole.

If the *Camera* case, *supra,* left any uncertainty on the powers of the reviewing courts, such doubts were dispelled in the Pittsburgh case, *supra,* there during oral argument, it was clearly manifested, some questions as to the extent to which the court would be burdened with reading the record. In countering the government argument, that it had been reviewing, "on the whole record," both Justices Black and Frankfurter insisted that if the phrase meant anything at all, at the very least, it required the reviewing Judge to read all the evidence, Mr. Justice Black, (argument, P. 15 *N.L.R.B.* v. *Pittsburgh S.S. Co.,* 340 U.S. 498). Mr. Justice Frankfurter so effectively points out in his opinion, that the legislation was directed not to the mechanics but to the attitudes of judgment. What then is the attitude with which the reviewing court is to exercise its judgment? It is here that we apparently are faced with the question which finally eludes definition. The answer nevertheless lies in the following language of that opinion. "The Judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work." If the *Camera Case, supra,* standing alone is an ineffable gesture, standing with the *Pittsburgh Steamship Case, supra,* it either works or attests to a significant change in the administration of judicial review generally.

That there has been a change is most strikingly evidenced by the history of the *Pittsburgh* case itself, *supra.* That case had been up for review earlier, with the court rejecting the contention upheld in the Court of Appeals, (See *N.L.R.B.* v. *Pittsburgh S.S. Co.,* 337 U.S. 656), that

the trial examiner's findings revealed prejudice. But on the question of sufficiency of the evidence, the Court said, page 661, "without doubting the existence of evidence substantial under the Wagner Act, to warrant the board's finding we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act and the Taft-Hartley Act, in any way effect the scope of judicial review of Board's Orders." Though the statement is not expressed in the form of a holding, the Court apparently regarded it as equivalent to a holding, that there was substantial evidence under the old test, for in the course of the argument on the second review Mr. Justice Black said, "I thought that we *held* that the evidence was sufficient under the old act, that is what I intended then, that is the way I construe it now." (See argument P. 24, *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498). The Court of Appeals on the remand decided that the statute had broadened the scope of review and that under the new test the record considered as a whole did not entitle the Board's Order to enforcement. (See *Pittsburgh S.S. Co.*, 180 F. 2d 731, 6th Cir). The Supreme Court sustained this determination, which *ipso facto,* marks a difference at least in its criteria for substantiality.

In reliance upon these most recent opinions of the Supreme Court, the United States Court of Appeals for the District of Columbia Circuit rendered its opinion in the instant case. This reliance was with the assurance that the Administrative Procedure Act of 1946, *supra,* had broadened its scope of judicial review and had vested Federal Courts of Appeals with some degree of discretion in Workmen's Compensation matters; and with further assurance that even where their conscientious judgment, on a case in which Judges might differ on the issue of substantiality, said judgment will not be *Policed;* other courts having recognized this new mandate from the Supreme

Court's decisions, *supra,* are as follows: *N.L.R.B.* v. *Red Spot Elec. Co.,* (9th Cir.), 191 F. 2d 697, (1951), *N.L.R.B.* v. *Hart Cotton Mills, Inc.,* (4th Cir), 190 F. 2d 961 (1951), *Associated Union* v. *N.L.R.B.* (7th Cir.), 200 F. 2d 53, and *N.L.R.B.* v. *Reeder Motor Co.,* (6th Cir.), 202 F. 2d 802.

The foregoing cases, together with an abundance of other decisions, were rendered in the belief that they were carrying out the mandate of the Supreme Court as enunciated in the *Camera* and *Pittsburgh* cases, *supra.* These courts understand that mandate to mean, that obviously Federal Courts of Appeals should not exercise their judgments only on that part of the evidence that looks in one direction, but that the rationality or substantiality of a conclusion can only be evaluated in the light of the whole fact situation, or so much of it as appears, and that evidence, which may be logically substantial in isolation, may be deprived of much of its character or its claim to credibility when considered with other evidence.

**V. The Fact That the Longshoremen's and Harbor Workers' Compensation Act Is National In Scope Is Not Sufficient Within Itself To Warrant the Granting of the Writ of Certiorari.**

The petitioners seem to imply that because the Longshoremen's Act is national in character, that factor operates as sufficient basis for the issuance of the writ of certiorari by this court. Respondent does not conceive that to be the recognized procedure of this Court. What was said by Mr. Justice Roberts in the *Del Vecchio* case, *supra,* afforded ample ground for the granting of certiorari in that case.

Here the basic facts are different, the scale of evidence is not balanced and there is no call for the presumption to tilt the scale of evidence in favor of an award. The petitioners case as here presented is stripped of all evi-

dence on the issue of non-aggravation. They have argued at length with reference to the illness of the deceased, but have yet to offer anything tangible against the issue of aggravation and its relation to employment. They have failed to cite one case that precludes the operation of the presumption under Section 20(a) of the act. The opinion of the United States Court of Appeals in the instant case is ably decided; it is well guarded and written with due appreciation of the Administrative Act of 1946, *supra,* together with an understanding of the decisions of this Court construing said act.

The petitioners were accorded every right in the Court of Appeals, there was a 2 to 1 decision against them in said court on April 16, 1953. Petitioners then sought a rehearing by the nine Judges in banc. The nine Judges, constituting the full Bench of that Court, *considered* the petition for rehearing in chambers and voted 7 to 2 to deny the petition for rehearing (R. 112).

Certiorari is granted when the Supreme Court determines that a Court of Appeals has applied an incorrect principle of law, *not where,* the Court of Appeals has struggled with intellect and patience in order to give the statute the construction intended by the Congress of United States and ratified by decisions of this Court. Thus, in the case of *Labor Board* v. *American Ins. Co.,* 343 U.S. 395, decided by this Court on May 26, 1952, this Court reaffirmed the doctrine laid down in the *Pittsburgh* case, *supra.* The opinion was written by the late Chief Justice Fred M. Vinson and held in part as follows: "Last term we made it plain that Congress charged the Courts of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the board, we stated that this court is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in their place we would find the record tilting one way rather than the

other, though fair minded Judges could find it tilting either way." We repeat and reaffirm this rule, noting its special application to cases where, as here, a statutory standard such as *good faith*, can have meaning only in its application to the particular facts of a particular case.

In *Labor Board* v. *Pittsburgh*, 340 U.S. 498, 502, the Supreme Court said, "*Certiorari is granted only* in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." The same consideration that should lead us to leave undisturbed, by denying certiorari, decisions of Court of Appeals, involving solely a fair assessment of a record on the issue of substantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

In such situation this Court should adhere to the usual rule of non interference, accord: *Federal Trade Comm.* v. *American Tobacco Co.*, 274 U.S. 543.

It is well that this Court's attention be directed to the fact that the petition for a writ of certiorari filed herein, is conspicious by the absence of Mr. Ward E. Boote, assistant solicitor, United States Department of Labor, with whom Messrs. Charles M. Ireland (then) United States Attorney, Leo A. Rover (now) United States Attorney, and James E. Hughes, Attorney, United States Department of Labor, were on the brief in the United States Court of Appeals for appellee Theodore Britton (R. 89). That the said Messrs. Ward E. Boote and Leo A. Rover appeared as counsel for appellee Theodore Britton, Deputy Commissioner, on the petition for rehearing by the court in banc (R. 110). The fact that appellee, Theodore Britton, Deputy Commissioner, is not a party to the petition herein, for a writ of certiorari is indicative of the correctness of

the instant opinion of the Court of Appeals. The underlying legal philosophy in the *Camera* and *Pittsburgh* cases, *supra,* is that, if Courts of Appeals are to be required to perform a function, then they cannot, without loss of self respect, be asked to make judgments counter to their basic convictions.

Insofar, as our institutions for forming policy and making decisions rests on the judgment of men; these men must be given a sphere of moral autonomy, care should be taken not to coerce their consciences, though insofar as limits to their power must be set, that end cannot always be achieved. Overt failures to understand the law may be corrected, and applications so egregiously wide of the mark, as to suggest misunderstanding of the applicable standards may from time to time be set right, but those who are primarily entrusted with the day to day business must be left to their consciences.

**Conclusion**

In the light of the reasons advanced by the respondent, herein above, together with the decisions of this and other courts cited, it is respectfully urged that the petition for a writ of certiorari filed herein be denied.

Respectfully submitted,

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